In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-979

JOSEPH LEON STOBAUGH,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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for the Ninth Circuit

To the Honorable Chief Justice of the United States and To the Honorable Associate Justices of the Supreme Court of the United States:

Joseph Leon Stobaugh, the petitioner herein, hereby petitions this court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on September 7, 1978.

OPINIONS BELOW

The opinion of the Court of Appeals entered on September 7, 1978 is unreported. The memorandum of the said Court's opinion is printed as Appendix A to this Petition. The verdict in the Federal District Court entered on February 18, 1977, is printed as Appendix C. The judgment entered by the District Court on March 14, 1977 is printed as Appendix D.

JURISDICTION

The judgment of the Court of Appeals was entered on September 7, 1978. An order denying a rehearing was entered on October 24, 1978, and is printed as Appendix B. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

The question is whether in a prosecution under 26 U.S.C. § 7206 (1) evidence that the taxpayer's unreported gross receipts when received were immediately paid out for needed materials and other business expenses, resulting in no tax liability, has any tendency to make the existence of an intent to make and subscribe a false tax return less probable than it would be without the evidence, thus relevant and admissible evidence under Rule 401.

STATUTES AND RULES INVOLVED

This case involves 26 U.S.C. § 7206 (1) and Rules 401 and 402 of the Federal Rules of Evidence, which provide as follows:

26 U.S.C. § 7206 (1):

> Any person who—Willfully makes and subscribes any return . . . which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter . . . shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

RULE 401—Definition of "Relevant Evidence":

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

RULE 402—Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

STATEMENT OF THE CASE

Joseph Leon Stobaugh in his small—not very successful—sewer and waterline business had someone else do his bookkeeping and taxes because he didn't know how; and he also didn't know that when business expenses were paid directly out of gross receipts, like when he received a joint payee check, endorsed it, and handed it to a supplier (the other payee) for materials, it was still considered a gross receipt to be included in his tax returns.

Stobaugh was a laborer—poorly educated but honest, deeply religious, and patriotic—who started digging cesspools by hand and remained in that line of endeavor for 15 years until he advanced to laying sewer and water lines. His business was small with little profit, although he sometimes received fairly large sums of money which went to pay his material suppliers and other business expenses, often on a cash basis. He had no bookkeeping or tax education or experience and he always relied on others to do his tax returns. He would often receive checks, for the most part joint checks (two party payee) made out to Stobaugh and a supplier, which he would endorse and hand over to the supplier in payment for materials to be delivered on the job site. Sometimes he would deposit a check, reserving some cash with which he paid business expenses that he had to pay on a cash basis. He didn't think it was necessary to report these gross receipts and expenditures to his bookkeeper because they were equal to and offset each other, and there was no tax resulting from the transactions. Since some of his gross receipts and the costs of goods sold and other business expenses paid out of them were not included in his tax returns, he was prosecuted for making and subscribing false tax returns by omitting the gross receipts.

At his trial Stobaugh wanted to introduce corroborating evidence, including records, receipts and the testimony of others, that the unreported gross receipts consisted for the most part of the joint payee checks which went directly to his suppliers for materials, that the unreported business expenditures equalled the unreported receipts, and that there was no tax liability resulting from the transactions,

to support his contention, that since there was no taxable income involved he did not believe under the circumstances that the gross receipts had to be reported. The trial judge wouldn't allow the evidence on the basis that the expenses "are not relevant to the question of the gross business receipts."

The Ninth Circuit affirmed Stobaugh's conviction on the basis that:

> "Because the actual amount of a defendant's tax liability is irrelevant in a tax prosecution under Section 7206 (1), the judgment below is affirmed."

It further stated as to Stobaugh's efforts to show what his business expenses had been:

> "However, the proffered evidence is completely irrelevant to the issue of Appellant's intent to falsely report his income. The actual amount of Appellant's business expenses has no bearing on his defense that he believed the amounts used for business expenses did not constitute income. Appellant testified that this was his mistaken belief, and this theory was fully argued to the jury, *who evidently disbelieved him.*" (Emphasis added)

As touched on above, Leon Stobaugh's formal education was very limited. He went to two rural schools in Oklahoma, each a two-room school, before he came to California at the age of 15, in 1941. When he arrived in California he entered the seventh grade . . . "went to a little shack here in Greenfield, maybe seven miles out of Greenfield." He then went three weeks to high school, and that was the extent of his formal education.

While going to school in California he worked on a dairy . . . "2 hours a morning before school and 2 hours at night." He milked cows and took care of the animals. He continued to work on the dairy after he quit school until he went into the Army in 1944.

Leon ". . . was raised a Pentecostal all my life . . . I mean, I went in the service and I was a Pentecostal boy." When he was in the service he ". . . was trying as a combat medic." He was in the Philippines when the war was over. He was a minister in the Pentecostal Church for nearly 28 years before his trial ". . . in the same pulpit."

Never, at any time, while in grammar school, his three weeks in high school, while in the service, or after he got out of the service, did he have any training or experience in bookkeeping or tax work. He never did his own tax returns.

After Stobaugh got out of the service he worked as a laborer for a short period of time, then tried his hand as an apprentice carpenter. That lasted less than 30 days. "I just didn't know the figures and squares and things so I just couldn't make it on the job."

After that Leon started digging cesspools by hand. He dug cesspools and septic tanks "for some 15 years."

One of the developers that Stobaugh did work for testified that he underbids jobs and apparently doesn't take much profit out of his business. He lost money and went broke in 1968 and 1969 and had to go to work for someone else. He had forty law suits against him.

A number of Stobaugh's business acquaintances, people in his community, and church members testified as to his

reputation for honesty and integrity and that it was good. This was not refuted. He has never had any other run ins with the law of any kind and he had a good service record; this was all verified in his probation report. He married his childhood sweetheart and has been with her over thirty years. His income from the church was investigated when this problem arose but it was not challenged and was not part of this action.

Stobaugh tried a number of times and in a number of ways to get it into evidence that the unreported gross receipts went to pay business expenses and that they equalled the receipts, but it was never allowed. In spite of this the prosecutor in his final summation, his rebuttal argument, argued that the money had been used for living expenses. Referring to Stobaugh, the prosecutor made this statement: "He said that all the money went to expenses, business expenses. What did he use for living expenses?" He knew that Stobaugh had income from the church and that during the years in question he reported his net income from the business, which was sufficient to live on. The prosecutor constantly kept the figure of $500,000 gross income from 1967 to 1971 before the jury, though that included the reported gross receipts as well as the unreported, and Stobaugh couldn't really reply, or show he hadn't pocketed the money, because he couldn't put on his evidence of business expenses, the total or the circumstances thereof.

The indictment for 1970 states that Stobaugh reported gross receipts of $13,833.00 and that the gross receipts were in fact $37,885.00, a difference of $24,052.00; but the

IRS sent a statement to Stobaugh showing additional expenses "allowable" against income of $21,278.99. This showed a difference of only $2,773.01 for gross receipts not set off by expenses that they "allowed".

The indictment for 1971 states that gross receipts of $147,062.52 were reported and that the gross receipts were in fact $321,902.27, a difference of $174,839.75; but the IRS statement sent to Stobaugh showed additional expenses "allowable" against income of $169,369.79. This showed a difference of only $5,469.96 for gross receipts not set off by expenses that they "allowed".

It was Stobaugh's position that he could account for and present evidence that the remaining small balance went for business expenses, but he was not allowed to do so.

Stobaugh was not allowed to introduce the above referred to statement from the IRS into evidence. It should be noted that the statement showed that *almost all* of the "additional expenses allowable against income" consisted of the joint payee checks to Stobaugh and his suppliers.

In another instance out of $122,518 that was claimed to have been paid to or on behalf of Stobaugh, which the prosecution was claiming in the unreported gross receipts for a year prior to those in the indictment, to prove intent, it came out that only $34,000 went directly to Stobaugh, the rest went directly to other people, except for $6,000 to Stobaugh and Garrett, his attorney, that actually went to his attorney. $70,518.35 went directly to various suppliers of Stobaugh. This was brought out on cross examination and is an example of the sort of evidence that Stobaugh was not allowed to put on directly, because not relevant.

REASONS FOR GRANTING THE WRIT

This case concerns the basic right of a citizen of the United States to get a fair trial in the courts of the United States when he is charged with an alleged tax crime.

The rules of evidence, particularly as to what is "relevant evidence", as they are being applied in the district courts and circuit courts in the prosecution of alleged tax crimes are effectively denying the accused a fair trial.

The courts are de facto (in fact) taking away from the accused by their strained interpretations of what is or is not relevant evidence, what they de jure (by law) are required to give him in their instructions to the jury, that is that the jury cannot presume intent from the act, but if all it hears is the prosecution's evidence as to intent, while the evidence offered by the accused is denied admittance on the ground that it is not relevant, so that the prosecution is given wide latitude as to what is relevant in its presentation of evidence, and the defense is given no latitude as to what is relevant in its presentation of evidence, the result can be the same, a presumption of the intent from the act. The jury goes through days of testimony and documentary evidence regarding the act: failure to report gross receipts, both for the years in question and for prior years—to show intent, while the defense is required to sit on its hands and present nothing by way of rebuttal such as: that the gross receipts were offset by business expenditures, and there was no taxable income involved, and that is why the accused didn't report the gross receipts in his tax returns, is because he thought he only had to report taxable matters, (remember he is a high class laborer with an eighth grade education, not

an IRS agent or some other kind of tax specialist, and he could make a dumb mistake like that) and therefore he didn't have the intent to make and file a false tax return, as a result of which you should not find him guilty in this case because intent is an essential ingredient in this alleged crime, which the prosecution must prove beyond a reasonable doubt, and you can see here by the evidence that we have presented, which the court has so wisely held is relevant, that the accused had no such intent.

Let us consider the possible variations in the nature of the transactions involved in Stobaugh's case:

(1) A land developer writes a check to a materialman (supplier) for the purchase of pipe on his own account which he has contracted with Stobaugh to lay. He hands the check to Stobaugh who takes it to the supplier, hands it to the supplier and has the pipe delivered to the job site. Is that a gross receipt to Stobaugh? Not likely.

(2) The developer has contracted with Stobaugh to supply and lay the pipe. The developer makes a check out to the supplier, for the purchase of pipe on Stobaugh's account, which Stobaugh delivers to the supplier, and the pipe is delivered to the developer's job site. Is this a gross receipt to Stobaugh which Stobaugh must report on his tax return? If so, it would seem to be on the razor's edge (though there is evidence of this sort of conclusion in the $70,518.35 transaction referred to above).

(3) The developer makes out a joint check to Stobaugh and the supplier, hands it to Stobaugh who then endorses it and delivers it to the supplier for pipe. Is this much different than (2)?

(4) The developer makes out a check to Stobaugh for work performed and Stobaugh deposits the check, holding out some cash which he pays to the supplier for pipe.

It does not seem a far stretch from (1) to (4), although (4) would seem to be a gross receipt that should be included in the tax returns, and maybe even (3). It is the (3) type of transaction that composes nearly all of the government's case against Stobaugh.

Is it inconceivable that an honest advanced laborer with an 8th grade education and no bookkeeping or tax education, or experience, might mistakenly conclude that since the above transactions are not taxable to him they need not be included in his tax returns? Stobaugh testified that he had always done things that way.

Wouldn't the facts that the expenditures offset the receipts, that the total expenditures equaled the total receipts, that there was no tax resulting from the individual transactions, and that there was no tax liability resulting from the sum total of the transactions, which even Stobaugh could understand, have even a slight tendency, *any* tendency, (within the terminology of Rule 401) to cast some light on the bona fides of the Petitioner? If so, the evidence that Petitioner tried to introduce at his trial was relevant as to his intent and should have been admitted. The evidence was not only relevant to the Petitioner's intent, it was *crucial* to his defense, as is evidenced by the fact that he is here.

We submit that the decisions of the Circuit Courts are conflicting and confused as to what is relevant to establish intent in the prosecution of alleged tax crimes.

By a progressive extension of holdings in earlier cases where the courts considered the circumstances of the particular case at hand to determine if the offered evidence as to intent was relevant, the courts have reached a point at which they are asserting as a general or absolute rule that evidence which is patently relevant in a particular case is not relevant, such as the taxpayer's business expenditures or tax liability.

The Circuit Courts are in conflict with the holdings of this court, as set out in *Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240 (1952) where it was stated that:

> "Where intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury."

and where it was further stated at 342 U.S. at 276:

> "Whether the intent existed, the jury must determine, not only from the act . . . but from that together with defendant's testimony and *all* of the surrounding circumstances." (emphasis added)

The Circuit Courts have also extended their decisions to the point that they are in conflict with Rule 401 of the Federal Rules of Evidence.

> RULE 401—Definition of "Relevant Evidence"
>
> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Pertinent parts of the Advisory Committee's Note under Rule 401 are set out below, because we think they might

be helpful in showing where the Circuit Courts are in error. (Citations of authority and from which quotes have been taken are omitted for the sake of brevity.)

ADVISORY COMMITTEE'S NOTES

Problems of relevancy call for an answer to the question whether an item of evidence, when tested by the processes of legal reasoning, possesses sufficient probative value to justify receiving it in evidence. Thus, assessment of the probative value of evidence that a person purchased a revolver shortly prior to a fatal shooting with which he is charged is a matter of analysis and reasoning.

Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case. Does the item of evidence tend to prove the matter sought to be proved? Whether the relationship exists depends upon principles evolved by experience or science, applied logically to the situation at hand. The rule summarized this relationship as a "tendency to make the existence" of the fact to be proved "more probable or less probable."

The standard of probability under the rule is "more . . . probable than it would be without the evidence." Any more stringent requirement is unworkable and unrealistic. "A brick is not a wall." "It is not to be supposed that every witness can make a home run." Dealing with probability in the language of the rule has the added virtue of avoiding confusion between questions of admissibility and questions of the sufficiency of the evidence.

The rule uses the phrase "fact that is of consequence to the determination of the action" to describe the kind of fact to which proof may properly be directed. The fact to be proved may be ultimate, intermediate, or evidentiary; it matters not, so long as it is of consequence in the determination of the action.

We submit that the Circuit Courts in their rulings as to the relevancy of offered evidence are failing to distinguish between whether the evidence is offered to prove an ultimate fact such as tax liability in an evasion or failure to file case or is offered to prove an intermediate fact such as tax liability to prove the ultimate fact of intent in a false return case. As stated in the Advisory Committee's Note above:

> "The fact to be proved may be ultimate, intermediate, or evidentiary; it matters not, so long as it is of consequence in the determination of the action."

It appears that this is why the courts are saying that proof of tax liability is relevant in evasion cases but not in false return cases: that they are not recognizing that under the circumstances of some false return cases, proof that expenditures equal receipts and that there is no tax liability is an intermediate fact to be proved by the evidence offered to help prove the ultimate fact of intent.

United States v. Carter, 522 F.2d 666, 685 (D.C. Cir. 1977), referring to Rule 401, states that "The basic relevancy test is whether proffered evidence has a tendency to make the existence of a fact more or less probable than would be the case without benefit of the evidence."

In *United States v. Carranco,* 551 F.2d 1197, 1200 (10th Cir. 1977), the court stated that "The federal rules and practice favor the admission of evidence rather than its exclusion if it has any probative value at all."

The Circuit Court in its memorandum filed September 7, 1978, on line 25, page 2 thereof stated: "It is clear, however, that the actual amount of any tax liability is totally irrelevant in such a prosecution", and the court cites *United States v. Johnson,* 558 F.2d 744 (5th Cir. 1977), as authority for this proposition.

It is not clear from *Johnson,* 558 F.2d at 746, where it states "The irrelevancy of Johnson's alleged overpayment of tax to any issue at *his* trial is firmly established by cases in this and other circuits." (italics added), whether it is meant to be limited to the *Johnson* case under the circumstances of the case, or whether the court is asserting what it considers to be a general or absolute rule in all the false statement cases. If the *Johnson* holding is meant to apply only to that case under the *circumstances* of the case then it is consistent with the cases it cites as precedents for its holding, but if it is meant to assert a general or absolute rule, then it is inconsistent with the prior holdings, which either consider the circumstances of the case as to the relevancy of the proffered evidence as to intent, or from the facts and discussions set out in the reports of the cases, seem to be considering the relevancy of such evidence only as an ultimate fact to be proved like in evasion cases and failing to file cases.

Schepps v. United States, 395 F.2d 749 (5th Cir. 1968), another Fifth Circuit case like *Johnson* and the first one

cited in *Johnson*, gives no statement of the factual situation of the case and although it states that proof that the falsity resulted in no tax deficiency was not relevant to the issue raised by the indictment, it is not clear, and is not indicated in any way, as to whether the proffered evidence was sought to be introduced as to the ultimate fact of no tax deficiency, as in an evasion or failure to file case, or whether it was proffered as an intermediate fact relevant to the proving of intent.

Schepps as authority for the proposition that tax liability is not relevant in a false statement case is not supported by the cases it cites as precedents. The same cases are also cited in Johnson. *Siravo v. United States*, 377 F.2d 469 (1 Cir. 1966), and *Hoover v. United States*, 358 F.2d 87 (5 Cir. 1966), contain no discussion, in either case, as to intent and evidence relevant to the proving of intent. *Silverstein v. United States*, 377 F.2d 269 (1 Cir. 1967), considered the relevancy of the slight amount of additional tax to defendant's state of mind in reporting his income and under the circumstances of the case held it inadmissible, on the basis that defendant would not have known the tax figure unless he first knew the amount of his additional income.

United States v. Fritz, 481 F.2d 644 (9th Cir. 1973), a false statement case, where offered proof relating to adjustments which would have affected appellant's tax liability was rejected because "without . . . any receipts, records or anything to back them up" and "There was no testimony that the Appellant considered making the proposed adjustments when he filed his tax return . . ." held: "The offered proof *under these circumstances* was not relevant to the issue of wilfulness. . ."

United States v. Jernigan, 411 F.2d 471 (5th Cir. 1969), cited in *Johnson*, holds that defendant's check activities in prior and subsequent years is a *circumstance* to consider along with other evidence in determining an intention on the part of the defendant to defraud the government. The court held it was not necessary for the Government to prove a deficiency in tax for the years in question, but it was silent as to whether such evidence was admissible by prosecution or defense to show intent.

United States v. Brown, 411 F.2d 1134 (10th Cir. 1969), a false statement and evasion case, was reversed because defendant was not allowed to introduce corroborating evidence to substantiate his claim that he did not believe the income, gross receipts consisting of merchandise and services, was taxable. The defendant's contention was that at no time did he ever have reason to believe or consider *under the circumstances*, that the goods, merchandise and services received by him were taxable income to him. The defendant alleged an oral agreement to pay for the merchandise if it was found to be for his personal benefit. The court held that "the accused as part of his defense is entitled to *wide latitude* in the introduction of evidence which tends to show lack of specific intent." In *Brown*, at page 1138, it was held that the relevancy of the corroborating evidence "is patent." Though the corroborating evidence proffered by Stobaugh in this case is of a different nature, we submit that it is also patent.

Unlike the situation in *Fritz* (above) Stobaugh in this case was not without receipts, records or anything to back up his position, as is evidenced by the fact he was dealing with materialmen and other business men who would have

records, and by the voluminous records introduced by the prosecution in this case.

Unlike the situation in *Silverstein*, supra, Stobaugh could be expected to know that when a gross receipt was set off by an expenditure, there would be no taxable income.

It is submitted that the jury should be allowed to consider these circumstances of a setoff between receipts and expenditures and the fact there would be no taxable income from such transactions "in determining whether or not there was an intention on the part of the Defendant to defraud the Government . . ." as set out in *Jernigan*, supra, 411 F.2d 472, 473.

It is submitted that the nature of the transactions that Appellant wanted to show in his proffered evidence is such that it is clearly relevant to his intent and that the jury should have been allowed to consider it among other circumstances presented. Appellant wanted to introduce evidence not only as to his tax liability but as to the circumstances of the receipts being directly and immediately offset by expenditures.

Under the definition of relevant evidence in Rule 401—would the evidence offered by Stobaugh, as to the circumstances of the receipts being offset by the expenditures, with no tax liability thereon, have a tendency to make fraudulent intent on Stobaugh's part" . . . less probable than it would be without the evidence?" We submit that it would, that it is relevant; and that it should have been admitted.

We submit that the ruling in *Johnson* and other cases it cites is unnecessarily restricting the discretion of the trial judge in an area where it should not be restricted.

If this court is concerned about reviewing the discretion exercised by the trial judge, or his failure to exercise it, we would like to remind you of what Maurice Rosenberg, Professor of Law, Columbia University in the print of his lecture entitled "Appellant Review Of Trial Court Discretion" 79 F.R.D. 173, said at 184; he says:

> "The most common example of promiscuous deference by appellate courts is the case in which the reviewing tribunal has before it all the material upon which decision hinges, and still it bows to what it perceives as the trial court's discretion in the matter. Why? When the appellate court has as much before it as the trial judge did, and when the matter is not one of those issues in which the circumstances are so diffuse that no rule or standard can be fashioned, the appellate court should not defer to the trial judge's choice in the absence of some particular and cogent reason for doing so."

CONCLUSION

Wherefore, Joseph Leon Stobaugh, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in the above-entitled case.

Respectfully submitted,

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(Appendices Follow)

Appendices

Appendix A

United States Court of Appeals
for the Ninth Circuit

No. 77-1898

United States of America,
Plaintiff-Appellee,
vs.
Joseph Leon Stobaugh,
Defendant-Appellant.

[Filed September 7, 1978]

Appeal from the United States District Court
for the Eastern District of California

MEMORANDUM

Before: TRASK and HUG, Circuit Judges, and
ORRICK,* District Judge

Stobaugh appeals from a judgment of conviction on two counts of willfully and knowingly making false statements on his income tax returns for the calendar years 1970 and 1971, in violation of 26 U.S.C. § 7206(1),[1] contending the district court committed reversible error by precluding him

*Honorable William H. Orrick, United States District Judge for the Northern District of California, sitting by designation.

[1]Section 7206(1) provides that any person who "[w]illfully makes and subscribes any return . . . which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter . . . shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution."

from introducing evidence concerning the amount of his business expenses in the subject years.

Because the actual amount of a defendant's tax liability is irrelevant in a tax prosecution under Section 7206(1), the judgment below is affirmed.

I.

Appellant indirectly cashed checks received by him without recording the checks in gross receipts. For example, he would receive a check from one party and endorse the same check to another party in order to purchase needed materials. Appellant testified that he did not consider the amounts received income because the expenditure was equal to the gross receipt. Appellant also cashed portions of checks received by his business in order to pay business expenses, and only the remaining portions were reported as income by his accountant, who apparently did not know the amounts of the checks which appellant had cashed.

Appellant was charged with willfully misstating his gross business receipts in both his 1970 and 1971 income tax returns in violation of 26 U.S.C. § 7206(1). His defense was that since he believed that the portions of the checks which he used to pay business expenses were not income, he had not willfully subscribed to false returns by failing to report these amounts as income.

II.

In a criminal action under 26 U.S.C. § 7206(1) the prosecution must prove that the taxpayer *willfully* made a false statement in his tax return. *United States v. Pomponio*, 429 U.S. 10 (1976); *United States v. Bishop*, 412 U.S. 346

(1973). It is clear, however, that the actual amount of any tax liability is totally irrelevant in such a prosecution. *United States v. Johnson*, 558 F.2d 744, 746 (5th Cir. 1977), *cert. den.*, 46 U.S.L.W. 3526 (1978).

Defendant argues strenuously that he was entitled to show that his business expenses had been for the years in question and relies on Rules 401 and 402 of the Federal Rules of Evidence, making all relevant evidence admissible. However, the proffered evidence is completely irrelevant to the issue of appellant's intent to falsely report his income. The actual amount of appellant's business expenses has no bearing on his defense that he believed the amounts used for business expenses did not constitute income. Appellant testified that this was his mistaken belief, and this theory was fully argued to the jury, who evidently disbelieved him. Accordingly, the judgment is AFFIRMED.

Appendix B

United States Court of Appeals
for the Ninth Circuit

No. 77-1898

United States of America,
Plaintiff-Appellee,
vs.
Joseph Leon Stobaugh,
Defendant-Appellant.

[Filed October 24, 1978]

ORDER

Before: TRASK and HUG, Circuit Judges, and ORRICK,* District Judge

The petition for rehearing is denied.

*The Honorable William H. Orrick, United States District Judge for the Northern District of California, sitting by designation.

Appendix C

United States District Court
FOR THE
Eastern District of California
at Fresno

No. F-76-206-CR

United States of America,

vs.

Joseph Leon Stobaugh,

[Filed February 18, 1977]

VERDICT

We, the Jury, find Joseph Leon Stobaugh, defendant herein:

Guilty (Guilty) or ..... (Not Guilty) as charged in count 1 of the indictment.

Guilty (Guilty) or ..... (Not Guilty) as charged in count 2 of the indictment.

February 18, 1977 (Date)

MILAIN J. THOMSON (Foreman)

Appendix D

United States District Court for
Eastern District of California
Fresno

Docket No. F-76-206-CR

United States of America,

vs.

Joseph Leon Stobaugh,

Defendant.

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant in person on this date

MONTH	DAY	YEAR
March	14,	1977

COUNSEL

__ **WITHOUT COUNSEL** **However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.**

X WITH COUNSEL Robert L. Meadows, retained

PLEA

___ GUILTY, and the court being satisfied that there is a factual basis for the plea,

___ NOLO CONTENDERE

X NOT GUILTY

FINDING & JUDGMENT

There being a finding/ verdict of

___ NOT GUILTY. Defendant is discharged

X GUILTY.

Defendant has been convicted as charged of the offense(s) of 26 USC 7206(1)—False Statement on Income Tax Return.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of (2) years as to count 1 of the indictment; a like sentence is pronounced as to count 2, to begin and run concurrently with count 1.

SPECIAL CONDITIONS OF PROBATION

A stay of execution is granted to March 21, 1977.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a

warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

_X_ U.S. District Judge

___ U.S. Magistrate

/s/ M. D. Crocker

Date: March 14, 1977